

No. 14453

United States
Court of Appeals
For the Ninth Circuit.

CALDWELL FINANCE CO.,

Appellant,

vs.

SAMUEL A. McALLISTER, Trustee in Bank-
ruptcy of the Estate of OSCAR HERMAN
HERREID, Bankrupt,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon.

FILED

NOV 15 1954

PAUL P. O'BRIEN
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

BARZEE, LEEDY, KEANE & ERWIN,
American Bank Building,
Portland, Oregon,
For Appellant.

F. BROCK MILLER,
Pittock Block,
Portland, Oregon,
For Appellee.

United States District Court
for the District of Oregon

B-34,121

In the Matter of:

OSCAR HERMAN HERREID,

Bankrupt.

REFEREE'S FINDINGS, OPINION
AND ORDER

Caldwell Finance Company claims title to, or a lien on, two used International trucks which have been sold free from liens by the trustee subject, however, to the right of Caldwell to claim the proceeds if its title or lien is found to be superior to that of the trustee in bankruptcy.

The undisputed facts are:

1. Oscar Herman Herreid was adjudged a bankrupt upon his voluntary petition filed on October 19, 1953.

2. At that time, the bankrupt was in possession of one 1950 and one 1951 International pick-up truck, which he had stored for sale on the Richfield Service Station lot in Portland. The bankrupt retained the keys to the trucks and delivered them to the Referee at the first meeting of creditors.

3. On October 21, 1953, notices of the first meeting of creditors were mailed to all creditors of the bankrupt, including Caldwell Finance Company. A few days later, Caldwell Finance Company made a

demand upon the bankrupt to deliver the trucks to it. On October 27, 1953, after the bankrupt and his counsel had advised Caldwell that the trucks were being held subject to the disposition of the bankruptcy court, Caldwell towed the trucks from the lot on which they were stored without the consent or knowledge of the bankrupt or of the person in charge of the lot.

4. On October 28, 1953, Caldwell mailed a registered letter to the bankrupt, as follows:

This is to notify you we have repossessed your 1951 International Pickup, Motor #SD-220-63303, and 1950 International Pickup, Motor #SD-220-33735, and intend to apply to the Secretary of State for repossession titles in our name.

Pursuant to the terms of the contract, and the laws of the State of Oregon, the pick-ups will be held a short time, and then be sold. Any deficiency will be collected from you.

We take this step with reluctance, and do not intend to preclude further negotiation for the payments on your contract.

Very truly yours,

CALDWELL FINANCE
COMPANY,

By /s/ DON TAYLOR.

Don Taylor.

Registered.

5. These acts upon the part of Caldwell were in direct contravention of the Bankruptcy Act and could be made the subject of contempt proceedings. *In re Swofford*, 112 F. Supp. 893.

6. The facts leading up to Caldwell's claim to the trucks are: On November 5, 1952, the bankrupt executed and delivered to Caldwell a chattel mortgage for \$2,600 upon a certain Mack Diesel tractor owned by the bankrupt and valued at \$5,500. This mortgage was duly recorded. In June, 1953, the bankrupt paid Caldwell \$100 plus accrued interest on the mortgage. In July, 1953, with the consent of Caldwell, the bankrupt traded the Mack tractor to the International Harvester Company for five used trucks.

7. Two trucks were sold immediately and \$500 was paid to Caldwell Finance Company, leaving a balance owing of \$2,000. To secure this balance, there was delivered to Caldwell the following documents:

(1) Bills of sale executed by International Harvester Company conveying to the bankrupt and Caldwell Finance Co. the two International trucks and one Ford Flatbed truck. In each bill of sale the International Harvester Company warranted the title to be free from encumbrances "except a lien in favor of Caldwell Finance Co."

(2) The certificates of title on the three trucks with the name of the bankrupt as transferee inserted on the back of each certificate.

(3) A contract of conditional sale, which on its face was drawn between the International Harvester Company and the bankrupt. The bankrupt had signed this contract, but it was not executed by the International Harvester Company. This company refused to execute the contract or to assign it to Caldwell Finance Company. The three trucks were described in the printed form of conditional sale contract. Also inserted was the contract price of \$2000, payable at the rate of \$100 per month with interest at 10% per annum.

8. On August 5, the bankrupt sold the Ford Flat-bed truck for \$800 and turned the money over to Caldwell, leaving a balance owing Caldwell of \$1,200. The applications for the transfer of the certificates of title on the two International trucks had not been signed by the bankrupt. Caldwell produced the two certificates at the first meeting of creditors and they were signed on the back by the bankrupt at that time to enable the trustee to proceed with the sale and transfer of the trucks.

9. Returning now to the date of bankruptcy, we find the bankrupt in possession of the two trucks which he is endeavoring to sell. Caldwell Finance Co. had in its possession the documents above described to secure the payment of the balance of \$1200 owing on the bankrupt's note in the original amount of \$2600. Caldwell never actually owned the two trucks and never had possession of them for purposes of sale.

Discussion of Law and Facts

The most that Caldwell can claim is that it had an informal contract of conditional sale on the trucks, and held possession of the unregistered certificates of title to secure the payment of the balance on the bankrupt's note. These documents had been accepted by Caldwell as security in lieu of the duly recorded chattel mortgage on the Mack Diesel tractor.

Every mortgage, conveyance or instrument intended as a mortgage of personal property, which is not accompanied by immediate delivery and followed by the actual and continual change of possession of the personal property mortgaged, or which is not recorded or filed as provided in ORS 86.350 and 86.370, shall be void as against subsequent purchasers in good faith and for a valuable consideration, of the same personal property or any portion thereof. ORS 86.420.

The trustee in bankruptcy has the status of an attaching creditor. ORS 29.150 provides that from the date of the attachment the plaintiff, as against third persons, shall be deemed a purchaser in good faith and for a valuable consideration of the property attached.

In *Kliks v. Courtemanche*, 150 Or. 332, the defendant sold and delivered to Phelps on open account a mower. Some months later defendant obtained a title retaining note from Phelps for \$277.72. of which \$105 represented the purchase

price of the mower. The remainder of the note represented various items, including an open account and small deficiencies owing on other equipment previously sold to Phelps. The plaintiff held a duly recorded chattel on the mower and other equipment in dispute. In holding against the defendant, the Supreme Court said:

“In view of all the facts and circumstances in this case, we are constrained to hold that by the instrument of December 5, 1931, the defendant did not retain title to the property sold by him to Phelps and that the most which can be claimed for that instrument is the effect of an unrecorded chattel mortgage. It was ineffectual to protect the defendant as against the recorded lien of a bona fide mortgage, such as plaintiff held.

“We are unwilling to extend our conception of what may constitute a conditional sale contract to include the transaction between Phelps and the defendant culminating in the execution of the instrument of December 5, 1931. Conditional sale contracts are affected with secretiveness by nature, and their function can be much abused.

“They should not be employed to displace chattel mortgages which to afford protection to the mortgage must be recorded.”

See also the discussion of the law pertaining to the rights of a trustee in bankruptcy in First Na-

tional Bank v. Wegener, 94 Or. 318, and Teshner v. Roome, 106 Or. 393. These cases are distinguishable upon the facts from the case before the referee in that the holders of the unrecorded chattel mortgages had obtained possession of the chattels prior to bankruptcy.

From the discussion of the law and the facts the conclusion naturally follows that Caldwell holds certain documents as security which must be construed as an unrecorded chattel mortgage which is void as to the trustee in bankruptcy.

Therefore, It Is Ordered, Adjudged, and Decreed that the title or lien claimed by Caldwell Finance Co. in the two International pick-up trucks is inferior to the title of the trustee in bankruptcy and that Caldwell Finance Co. is not entitled to the proceeds of the sale except insofar as it may participate in the distribution with other creditors.

Entered at Portland, Oregon, April 10, 1954.

/s/ ESTES SNEDECOR,
Referee in Bankruptcy.

Copies mailed to:

Ward H. Erwin,
American Bank Building,
Portland, Oregon.

F. Brock Miller,
Pittock Block,
Portland, Oregon.

[Endorsed]: Filed April 10, 1954.

Bill of Sale

Know All Men by These Presents:

That in consideration of One and no/100 Dollars (\$1.00) and other valuable consideration, the receipt whereof is hereby acknowledged, the undersigned (seller) does hereby sell, transfer and deliver unto Oscar H. Herreid & Caldwell (buyer) his right, title and interest in and to the following described vehicle:

Make: International.

Serial Number: 27966.

Year Manufactured: 1951.

Engine Number: SD220-63303.

Body Type: Pickup.

Model Number: L-110.

The said seller hereby warrants that he is the lawful owner of said vehicle; that it is free from all liens and incumbrances except lien* in favor of

Caldwell Finance Co.,

311 E. Burnside St., Portland, Oregon;

that he has the right to sell the same as aforesaid, and that he will warrant and defend the title of same against the claims and demands of all persons whomsoever except lienholder noted above.

*If no lienholder shown in this space the Dept. of Motor Vehicles will assume title is clear.

Signed this 15th day of July, 1953.

Signature of Seller:

INTERNATIONAL HAR-
VESTER COMPANY.

/s/ R. W. GRANT,
635 N.E. 2nd Avenue,
Portland, Oregon.

Subscribed and sworn to before me this
day of, 19.....

[Endorsed]: Filed April 29, 1954.

DATE CONTRACT 11-5-52

51 1st Sep 600.
50 1st Sep 600.

CAR MACK ~~book~~ YEAR 1919

MOTOR No. NHB75562

SELLING PRICE

INITIAL PAY.

No. MONTHS

INS. DEALER	DATE	TIME
INS. DEALER	2/16/1	10:57

COLLECTION
LINE AND TIT

P. D. P. L.

EXPIRATION DATE

PLEDGED TO

[illegible]

HERREID Oscar H

17	18	19	20	21	22	23	24	25	26	27	28	29	30	31
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12



NAME Oscar H. Bennett
RESIDENCE ADDRESS 3121 N 857th

WIFE'S NAME
NUMBER CHILDREN 5

PREVIOUS RESIDENCE ADDRESS
RENT OR IF NOT GIVE LANDLORD'S NAME AND ADDRESS

EMPLOYED BY
FORMERLY EMPLOYED BY

IF OPERATING OWN BUSINESS
STATE NAME AND TYPE

RESIDENCE TELEPHONE
BUSINESS TELEPHONE

CARRY BANK ACCOUNT WITH
BUSINESS REFERENCES (THREE FIRMS WITH WHOM YOU DO BUSINESS)

NAME
NAME
NAME

NAMES OF FATHER AND MOTHER, IF LIVING; IF NOT TWO NEAREST RELATIVES

NAME
NAME
NAME

PURCHASED LAST CAR FROM
LODGE AFFILIATIONS

LIFE INSURANCE CO., INSURANCE WITH
REMARKS

AGE
HOW LONG THIS ADDRESS
HOW LONG THIS ADDRESS
YEARS
YEARS
MONTHS
MONTHS

ADDRESS
ADDRESS
ADDRESS
ADDRESS
ADDRESS
ADDRESS

CONTRACT
#3832
CHECK
#3831
CHECK
CASH
INSURANCE
RESERVE
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REC. FEES
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HOW LONG
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CLERK, Acting Clerk
L. BUCK, Acting Clerk
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ORRISON

88

[Title of District Court and Cause.]

ORDER AFFIRMING ORDER OF REFEREE

This matter coming on upon Petition of Caldwell Finance Company for a review of that certain Order of Estes Snedecor, Referee in Bankruptcy, entered herein on April 10, 1954, and upon the Certificate of the Referee certifying said matter for review, and it appearing to the Court that the only question presented was whether the Referee erred in finding that the alleged conditional sales contract claimed by Caldwell Finance Company was in the nature of an unrecorded chattel mortgage to secure the balance due on a note previously executed by the bankrupt in the original sum of \$2,600.00, and it appearing to the Court that the facts are undisputed and are as set forth in the Findings of the Referee contained in said Order of April 10, 1954, and the Court adopts said Findings, and it appearing that said Caldwell Finance Company did not have a valid conditional sales contract but had a Bill of Sale in favor of itself and said bankrupt which said Bill of Sale was in the nature of a chattel mortgage, and which chattel mortgage was not recorded in accordance with the Recording Acts of the State of Oregon and, therefore, said mortgage is void as against the trustee in bankruptcy, and that said trustee held the trucks in question free and clear of any claim or lien of said Caldwell Finance Company, and, therefore, the Order of said Referee should be affirmed, it is, therefore,

Ordered, Adjudged, and Decreed, that the Order of the Referee herein dated April 10, 1954, be and the same is hereby approved and confirmed, and it is further

Ordered, Adjudged, and Decreed, that the title or lien claimed by Caldwell Finance Company to the two International Pick-up Trucks herein is inferior to the title of the trustee in bankruptcy, and that Caldwell Finance Company is not entitled to the proceeds of the sale except insofar as it may participate in the distribution of other creditors, and it is further

Ordered, Adjudged, and Decreed, that said trustee in bankruptcy shall hold said trucks free and clear of any claim or lien of said Caldwell Finance Company.

Dated this 1st day of June, 1954.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed June 1, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Caldwell Finance Company hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order entered in this matter on the 1st day of June, 1954,

whereby the Order of the Referee in Bankruptcy entered herein on April 10, 1954, was approved and confirmed.

BARZEE, LEEDY, KEANE

& ERWIN,

Attorneys for Appellant,

Caldwell Finance Company.

[Endorsed]: Filed June 30, 1954.

CLERK'S CERTIFICATE

United States of America,
District of Oregon—ss.

I, F. L. Buck, Acting Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing documents, consisting of Certificate of Referee on Petition of Caldwell Finance Co. for Review of Referee's Order of April 10, 1954; Petition to Sell Free and Clear of Liens dated November 19, 1953; Order to Show Cause dated November 19, 1953; Order Authorizing Sale Free and Clear of Liens dated November 30, 1953; Report of Sale and Petition to Confirm Sale dated December 8, 1953, with affidavits of mailing attached; Order Confirming Sale dated December 8, 1953; Trustee's Memorandum dated December 10, 1953; copy of Claimant's Memorandum; Referee's Findings, Opinion and Order dated April 10, 1954; Petition to Review Order of Referee with copy of Referee's Findings, Opinion and Order attached;

Bill of Sale dated July 15, 1953; Contract Card; Conditional Sales Contract; Order Affirming Order of Referee dated June 1, 1954; Notice of Appeal; Cost Bond and Designation of Record, constitute the record on appeal from an order of said Court in a certain bankruptcy cause therein numbered B-34121, In the Matter of Oscar Herman Herreid, in which Caldwell Finance Co. is appellant and Samuel A. McAllister, trustee of the estate of Oscar Herman Herreid, bankrupt, is appellee; that the said record has been prepared by me in accordance with the designation of record filed by the appellant, and in accordance with the rules of this Court.

I further certify that the cost of filing the notice of appeal is \$5.00 and that the same has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court in Portland, in said district, this 23rd day of July, 1954.

[Seal]

F. L. BUCK,
Acting Clerk.

By /s/ E. W. DAVIS,
Deputy.

[Endorsed]: No. 14,453. United States Court of Appeals for the Ninth Circuit. Caldwell Finance Co., Appellant, vs. Samuel A. McAllister, Trustee in Bankruptcy of the Estate of Oscar Herman Herreid, Bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed July 26, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals

No. 14,453

In the Matter of:

OSCAR HERMAN HERREID,

Bankrupt.

DESIGNATION OF RECORD AND POINTS

Come now Caldwell Finance Co. and Samuel A. McAllister, trustee, the parties hereto, and jointly designate for printing the following portions of the record:

1. Referee's Findings, Opinion and Order, omitting title of Court and cause.
2. Bill of Sale dated July 15, 1953, from International Harvester to Caldwell and Herreid.
3. Contract Card of Caldwell Finance Company.
4. Conditional Sales Contract dated July 15, 1953.
5. Order of the District Court affirming the Order of Referee, said Order being dated June 1, 1954.
6. Notice of Appeal.
7. Clerk's Certificate.

Point of Appeal on Which Appellant Will Rely

The Referee and the District Court erred in finding that the alleged conditional sales contract

claimed by Caldwell Finance Co. was not a valid conditional sales contract but rather was in the nature of an unrecorded chattel mortgage to secure the balance due on a note previously executed by the bankrupt to said Caldwell Finance Co., and hence was invalid against the trustee.

Dated this 13th day of September, 1954.

/s/ WARDE H. ERWIN,
Of Attorneys for Appellant.

/s/ F. BROCK MILLER,
Of Attorneys for Respondent.

[Endorsed]: Filed September 13, 1954.

